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THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES: THE RIGHT TO A FAIR TRIAL

National practices related to the right to a fair trial

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Addendum

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Introduction

1. The present document contains a summary of the information received by the Special Rapporteurs, principally from non-governmental organizations and bar associations, concerning national laws and practices relating to the right to a fair trial.

2. The Special Rapporteurs lacked the capacity to assess the veracity of the materials they received. Such an assessment would necessitate far more information and contextual investigation than were possible given the available time and resources. The Special Rapporteurs have, however, sought to reflect in this document the information they have already received from those Governments that responded to the questionnaire contained in annex II to the second report on the right to a fair trial (E/CN.4/Sub.2/1991/29). The Special Rapporteurs have also acknowledged their gratitude to those Governments which responded to the questionnaires in their previous progress reports and in the progress report which will be submitted to the forthcoming session of the Sub-Commission.

3. The Special Rapporteurs noted that the materials received from Governments, non-governmental organizations and bar associations reflect only an incomplete sample of countries. Indeed, the Special Rapporteurs collected information on trial practices in 65 countries of the 181 States Members of the United Nations. While that sample represents less than half of the Members, the Special Rapporteurs found that they could not provide more than a small reflection of trial practices in the 65 countries. A more detailed description of trial practices in any one country - much less 65 or 181 - would have required far more time, resources and space than were available.

4. None the less, the Special Rapporteurs believe the non-governmental and bar association materials should be summarized because they probably reflect the diverse problems arising in many countries with respect to the implementation of the right to a fair trial and a remedy. Because the material could not be verified, the Special Rapporteurs requested the Secretary-General to transmit a preliminary version of the present document to the Governments concerned and ask comments from those Governments. The Special Rapporteurs would be pleased to revise the summaries or otherwise reflect any comments received from Governments.

5. The Special Rapporteurs would be most grateful if the States concerned would review the material relating to their country and submit any comments or suggestions they may wish to communicate to the Special Rapporteurs as soon as practicable. The Special Rapporteurs will seek to reflect the comments received by Governments in further addenda to this progress report or in the final report.

6. The materials received by the Special Rapporteurs relate to various aspects of the right to a fair trial, including treatment during detention prior to and during trial, notice, counsel, hearing, composition of the court, decision, sentencing and punishment, appeal or other review in higher courts, pardon, other remedies, and procedures for juveniles. The following

information is organized according to the questions contained in the revised questionnaire on the right to a fair trial which was distributed to Governments (E/CN.4/Sub.2/1991/29, annex II).

I. TREATMENT DURING DETENTION PRIOR TO AND DURING TRIAL

7. The Special Rapporteurs received information about a wide range of procedures and conditions related to pre-trial detention - particularly as they may have a significant impact upon the fairness of the trial proceedings. The Special Rapporteurs received information on the accused's protection from torture or other ill-treatment as well as protection from coerced confessions and self-incriminating statements. Further, the Special Rapporteurs examined the remedies, such as habeas corpus and amparo, available for detainees seeking to challenge their conditions of pre-trial detention or the failure to provide fair procedures prior to trial.

8. Numerous States have constitutions guaranteeing the right to be protected from torture and other inhuman treatment. Despite the explicit prohibition on torture, however, pre-trial detainees are often still ill-treated. For example, article 35 (5) of the Constitution of the People's Republic of Bangladesh forbids torture and cruel, inhuman, or degrading punishment or treatment. In 1991, however, a non-governmental organization reported prisoner abuse at Dhaka Central Jail. Two eye-witnesses stated that seven prisoners were killed and as many as 2,000 others were burned with scalding water and tear-gassed in an incident at the jail between 8-10 April 1991. The informants reported that over 120 prisoners had their limbs methodically broken before being transferred to other prisons. In Iraq, article 22 (a) of the Constitution proscribes the use of physical or psychological torture. A non-governmental organization reported that widespread torture was used against Kuwaiti prisoners and members of Iraq's Kurdish and Shi'a population in 1991.

9. Constitutional safeguards are often supplemented by mechanisms which punish the government official who orders or commits the torture. The Penal Code of Zaire, for example, provides that officials convicted of ordering or committing "an arbitrary infringement on liberties or rights that are guaranteed by the law" will be punished by a fine and/or one year of imprisonment. In the Philippines, article 235 of the Revised Penal Code also prohibits the ill-treatment of prisoners by public officers in the correction or handling of the prisoner in their charge, in the imposition of punishment not authorized by regulations, and in the infliction of punishment in a cruel and humiliating manner. The crime is further aggravated if the ill-treatment is for the purpose of extorting a confession, in which cases the officer is temporarily suspended from service. A regional non-governmental organization, none the less, noted in 1992 that there is no effective implementation of these safeguards. Despite these express prohibitions on official ill-treatment of detained persons, the non-governmental organization reported that the military and the police continue these practices. Several international non-governmental organizations cite cases of detainees being tortured. In Mexico, a federal law (la Ley Federal para prevenir y sancionar la tortura) promulgated in 1986 made torture a crime. A non-governmental organization reported during July 1990 that torture by the police was an accepted part of the Mexican penal system and was used as an investigatory

tool by the police. A non-governmental organization reported that during 1990 a court in the former Yugoslavia found nine prison guards guilty of brutally beating 41 Albanians under their care; the court, however, imposed very light sentences. The court fined the guards approximately 426 dinars (US$ 40) and sentenced the guards to four months' probation, notwithstanding that the offence carried a punishment of from three months to three years in prison. Two prison administrators were found guilty of criminal negligence in the same case; the court, however, fined the administrators only 200 dinars and sentenced them to one year probation.

10. France has developed a useful method to protect the welfare of pre-trial detainees. Articles 64 and 65 of the French Code of Criminal Procedure permit the detainee to have a medical evaluation after 24 hours in detention and require that the detainee be informed of this right.

11. Torture and other uses of violence and threats are often used to extract confessions from the accused around the world. Article 277 of the Israeli Penal Code specifically proscribes the use of force to extract confessions. A non-governmental organization reports, however, that torture and ill-treatment of detainees in the occupied territories are common. Countries have adopted mechanisms other than penal laws to stem both torture and the use of confessions gained through torture in criminal trials.

12. Numerous countries deem confessions extracted under torture and other forms of duress inadmissible in criminal trials. In Zambia, for example, the High Court in 1978 dismissed as inadmissible evidence confessions of five people accused of the murder of a politician. The court found that the detainees had been severely tortured, denied food for three days, forced to do strenuous exercises, and denied medical treatment for injuries sustained during interrogation. The court did not, however, order the prosecution to investigate and prosecute those responsible for ordering or committing torture.

13. Tunisian law provides that any affidavit (procès verbal) signed during the preliminary detention is deemed invalid where the accused alleges torture. Despite this safeguard, one non-governmental organization has reported that the Government commonly tortures political detainees in order to extract confessions and to intimidate government opponents.

14. Several countries recognize either in their constitutions or criminal procedure codes the accused's right to remain silent. In Austria, for example, sections 203 and 245 of the Code of Criminal Procedure provide that the accused cannot be compelled to answer questions or confess their guilt. In 1991, however, a non-governmental organization reported that quite often police ill-treated detainees in order to coerce confessions. In Iraq, article 126 (b) of the Code of Criminal Procedure stipulates that an accused person cannot be forced to answer questions. None the less, a non-governmental organization reported in 1988 that children of detained political opponents were arrested for the purpose of compelling their parents to confess to political offences. In Turkey, article 38 of the Constitution recognizes the right to remain silent: "No one shall be compelled to make a statement that would incriminate himself or his legal next of kin, or to present such incriminating evidence". This guarantee is included in

article 50 of the Code of Criminal Procedure, which provides that, "a witness can refuse to testify where such testimony can incriminate him or any of (certain specified) relatives". In 1990, a non-governmental organization reported military and civilian security forces in Turkey were torturing detainees to extract confessions or statements implicating others, to obtain intelligence about opponents of the Government, to intimidate victims and opponents, and in effect, to punish detainees without trial.

15. In Sweden, the accused has the right to remain silent but according to the Swedish Code of Judicial Procedure, section 35:1, the judge can use silence against the accused when determining guilt. Austria has an identical provision which allows the silence of the accused to be evaluated freely by the court (sect. 258, para. 2, Austrian Code of Criminal Procedure). In Canada, however, section 4 (8) of the Evidence Act provides that "the failure of the person charged ... to testify shall not be made the subject of comment by the judge, or by counsel for the prosecution".

16. In Cuba, a confession obtained without the benefit of counsel cannot be used in trial and only testimony given in the oral trial and in the presence of the accused's lawyer will be used. In Italy, the Code of Criminal Procedure similarly provides that statements made to police during questioning are not admissible at trial unless defence counsel was present.

17. Not all countries segregate the accused detainees from those already convicted of a crime. In the Netherlands, for example, although the law stipulates that accused and convicted persons should be placed in different detention facilities in practice, due to the shortage of prison cells, convicted persons often serve their sentences in pre-trial detention centres. In Belgium, the Government reports that there is no separation of convicted and accused persons. In the Philippines, a non-governmental organization reports that municipal, city, and provincial jails house both convicted prisoners serving sentences of less than three years and accused prisoners undergoing trial. Military camps contain detention centres exclusively used to house political detainees.

18. There does not appear to be a universal norm as to the appropriateness of pre-trial detention. Several States have provisions which reduce detention pending trial. In China, detention pending trial is the norm. In this vein, articles 38-42 of the Code of Criminal Procedure provide, as a general rule, that persons who are awaiting trial shall be detained in custody unless the accused is ill, pregnant or breast-feeding. In the occupied territories, Palestinians are often held in prolonged incommunicado detention and are normally not brought before a judge for 18 days. Once the detainee is brought before a judge, the judge may issue, under article 78 (f) of Military Order No. 378, a further detention order for up to six months in the absence of any charges. Generally, detention orders will be imposed in succession - adding up to a maximum of six months. Once a charge sheet has been produced, the Israeli judge may, under article 78 (g) of Military Order No. 378, authorize detention until the end of the trial. Official statistics provided by the Israeli Defence Force to a non-governmental organization in November 1989 indicated that in the occupied territories, bail was granted in 314 cases between 1 May and 30 October 1989, although the number of releases on bail showed a consistent decreasing trend (from 142 releases on bail in May

to 24 in October). In Cambodia, the Supreme Judicial Council, with the assistance of the United Nations Transitional Authority in Cambodia (UNTAC), adopted a provision which vests a judge with the authority to detain a person pending trial only if there is a risk of escape or non-appearance.

19. The Government of Pakistan approved an amendment to the Criminal Code in October 1992 to curb rape by banning overnight police detention of women. Under the amendment, a woman can only be interrogated in police detention in the presence of her husband or a close relative, and cannot be held overnight. Women will be removed from judicial custody only with a court order.

20. Several States provide the accused person with the ability to initiate court proceedings to challenge the conditions of pre-trial detention or the failure to provide fair procedures prior to trial. In China, for example, article 41 of the Constitution allows Chinese citizens to institute a lawsuit or request a resolution from a competent government department. In this regard, one of the main officials of the Haidian Public Security Bureau, Beijing, was sentenced to 20 years' imprisonment for his involvement in the torture-related death of a detainee during the course of an interrogation.

21. Habeas corpus is recognized in several States. Even when a judge determines that an arrest is unlawful and orders release, the police authorities do not always comply. For example, during 1991 a non-governmental organization reported that 28 people in the Dominican Republic had been detained in jail, even though the courts had ordered their release. Earlier in 1990, a Dominican Republic newspaper reported the detention of 19 workers of the Dominican Corporation of Electricity, even though a judge of the Third Penal Common ordered their release through habeas corpus.

22. The remedy of habeas corpus is not very effective in Sri Lanka either. The thirteenth amendment to the Sri Lankan Constitution gives provincial High Courts the power to issue orders of habeas corpus with respect to persons detained illegally within their provinces. The Working Group on Enforced or Involuntary Disappearances of the Commission on Human Rights reported in 1992, however, that in 98 per cent of the cases the security officers denied arrest, in spite of many instances where the officers responsible for the arrest had been clearly identified by the petitioners.

23. Mexico recognizes amparo, a remedy similar to habeas corpus. Non-governmental organizations report, however, that in practice the efficacy of amparo is not very strong. For example, a non-governmental organization reported in 1991 that Mexican courts regularly accepted confessions obtained under duress during initial investigation, often as the sole evidence on which defendants are convicted. Confessions are frequently given legal precedence over subsequent contradictory statements a defendant may make, even in cases where he or she claims that the first confession was under torture.

24. The experience in Austria illustrates that accused persons run the risk of reprisal when attempting to challenge pre-trial conditions. Austria prohibits torture and other cruel, inhuman or degrading treatment. A non-governmental organization reported in a 1991 report, however, that there have been widespread reports of police ill-treatment and in some cases torture

of detainees. In some instances where those ill-treated persons lodged complaints with the authorities, the non-governmenta' organization reported that they were subsequently charged with defamation and perjury.

II. NOTICE

25. In cases not involving administrative detention, the length of time which a person can be detained without being charged for a criminal offence or without having his or her case submitted before a court varies widely throughout the world. For example, the Belgian Law of 20 July 1990 states that a person may not be detained for longer than 24 hours prior to being brought before a judicial official. In the United Kingdom, by contrast, a person can be held in police custody for periods varying from 24 hours to 7 days. Article 110 of the Chinese Code of Criminal Procedure requires the court to send the indictment to the accused 7 days prior to the opening of trial.

26. Article 32 of the Constitution of the Islamic Republic of Iran provides that following an arrest, charges and supporting evidence must be immediately communicated in writing to the detainee. In practice, however, one non-governmental report indicates that in 1990, persons charged with political offences were not promptly informed of the charges or evidence against them.

27. Uruguay does not have a strict time restriction on providing a detainee notice of the offence charged, yet provides judicial review early in the proceeding. The Uruguayan Constitution, article 16, states that "the judge, under the gravest responsibility, shall take a statement from the person under arrest within 24 hours and pre-trial proceedings shall begin within 48 hours at the most".

28. A State's regular notice requirement, however, is often limited in cases of administrative detention and other procedures justified by emergency conditions and other exigent national security measures. In the United Kingdom, for example, section 41 of the Police and Criminal Evidence Act (PACE) provides that a person may not be held for longer than 24 hours. If the person is suspected of having committed a "serious arrestable offence", however, the period of detention without charge can be extended to 36 hours upon authorization of a higher ranking officer, or up to 4 days with a magistrate's approval (PACE, sects. 42-45). Similarly, the 1989 Prevention of Terrorism (Temporary Provisions) Act (PTA) allows for detention without charge for up to 48 hours on police authorization (PTA, sect. 14, para. 4), and up to 7 days on authorization of the Secretary of State (PTA, sect. 14, para. 5). A non-governmental organization reported in 1993 that these provisions are used to obtain convictions involving those suspected of paramilitary activity, based on confessions obtained through prolonged detention and intense interrogation.

29. In Haiti, the Constitution stipulates that all arrestees must be brought before a judge within 48 hours. In practice, however, the Commission on Human Rights Special Rapporteur on Haiti reported in 1993 that detainees are regularly held for days, weeks, or in some cases, months without charge and without having been brought before judicial authorities.

30. India provides another example of how administrative detention deviates from the country's regular notice requirements. Article 22 (1) of the Constitution of India provides that no person shall be detained in custody without being informed, as soon as possible, of the grounds of arrest. Section 57 of the Code of Criminal Procedure stipulates that accused persons must normally be brought before a magistrate within 24 hours of arrest. The Code states in section 167 that at the formal request of a senior police officer, arrested persons can be kept in police custody for up to 15 days without a charge if the detention is authorized by a judicial magistrate. After the 15-day period, arrested persons must be remanded to judicial custody. The maximum period a person can be placed on remand by a magistrate is 60 days. The safeguards provided in the Constitution, however, do not apply to prisoners arrested under special legislation relating to national security. The Constitution, in article 22 (3), also states that "any person who is arrested or detained under any law providing for preventive detention" does not benefit from the protection of being presented before a magistrate within 24 hours of arrest. Although article 22 (5) of the Constitution establishes that a person held under preventive detention has the right to be informed "as soon as may be" of the grounds for arrest, according to article 22 (6), this guarantee can be denied on the grounds of "public interest".

31. In the occupied territories, a non-governmental organization reported in 1992 that people arrested are normally not informed in sufficient detail and at the time of arrest of the reasons for the arrest. In many cases, a non-governmental organization reported, the first if not the only opportunity detainees have to learn why they are being held is at an appeal hearing which they must initiate themselves. The appeal hearing usually takes place several weeks, sometimes months, after arrest. Even then, in almost every case detainees and their lawyers are not given sufficient information to enable them to exercise effectively the right to challenge the detention order.

32. The practice of administrative detention is authorized by the Constitution of Zambia. Article 27 (1) provides that detainees must be informed of the reason for their arrest within 14 days of arrest. The facts of the detention must be published within one month of the detention. An independent review of the detention is provided for in the Constitution. A review can only take place at the request of a detainee, however, and not until the detainee has been held for at least one year. Therefore, a detainee may be held for at least one year without charge or trial and without consideration by a judicial authority.

III. COUNSEL

33. The Special Rapporteurs received information about the right of accused persons to retain counsel as well as the right to appointed counsel for accused persons who are indigent. The following examples describe the provisions relevant to the right to counsel and, in particular, examines the ability of lawyers to consult with their clients during pre-trial detention. The Special Rapporteurs also received materials stating that the right to effective counsel had been abridged.

34. Uruguayan law explicitly guarantees the right to counsel in criminal cases. Under Uruguayan law the defence is not only a right of the accused, but a legal requirement which may not be waived. The defence counsel is considered an official party in court proceedings and whose participation is mandatory. Moreover, under the Code of Criminal Procedure, article 75, only lawyers with a valid diploma issued or validated by the University of the Republic, who have registered with the Uruguayan Court of Justice, are entitled to act as defence counsel in criminal cases.

35. In Mauritania, the right to counsel only applies to trial and not to pre-trial inquiries. Rwanda, in contrast, has a very broad right to counsel, where the Constitution specifies that "[d]efence is an absolute right in all of the stages and at all levels of procedure" (art. 14). Article 75.1 of Rwanda's Code of Criminal Procedure further specifies that "each party may be assisted by an authorized person, either to speak or to make a written declaration on his/her behalf. If the party rejects the designated defender, the president of the jurisdiction may appoint another public defender" (art. 75). The Government response to the fair trail questionnaire states that the essence of this provision is that the defendant may choose his defender.

36. In the former Soviet Union, article 122 of the federal Law on Changes and Additions to the Fundamental Principles of Criminal Procedure, adopted in 1990, stipulated that an accused shall have access to counsel after charges are brought against him. The 1990 law specifically stated that counsel shall be admitted from the time he is notified of the client's detention or from the time when confinement under guard is decreed, but no later than 24 hours after detention commences.

37. In Cambodia, the Supreme National Council, with the assistance of UNTAC, has adopted the provision that "[t]he right to assistance of an attorney or counsel is assured for any person accused of a misdemeanour or a crime". The provision also stipulates that "[n]o one may be detained on Cambodian territory more than 48 hours without access to assistance of counsel, an attorney, or another representative authorized by the present text, no matter what the alleged offence may be". The 1981 and 1989 Constitutions of Cambodia guaranteed a defendant's right "to rely on attorneys or anyone else". A non-governmental organization reported in 1992, however, that this right is limited by the extreme shortage of trained lawyers. In fact, there were fewer than a dozen persons with professional legal degrees in Cambodia during 1992.

38. A non-governmental organization reported in 1990 that the governing Revolutionary Command Council in Sudan recognized that criminal defendants have the right to counsel. The non-governmental organization reported, however, several incidents in which defence attorneys were barred from attending a trial.

39. A non-governmental organization reported that persons detained for political reasons in El Salvador during 1990 did not have access to counsel during pre-trial detention and were also required to make statements without the assistance of counsel.

40. Cuba also explicitly guarantees the right to counsel in criminal cases. The Law of Criminal Procedure, article 249, provides the accused with the right to an attorney and contact with his/her attorney, from the moment of detention. In political or public order offences, however, this right appears curtailed. A non-governmental organization reported during 1988 that defendants in political cases were frequently unable to meet with their lawyer until minutes before their hearing and that defence lawyers have no prior access to the prosecution's evidence. Another non-governmental organization reported in 1992 that public order offences brought against dissident and human right groups in Cuba are normally held within days of arrest in a municipal court where access to defence lawyers is non-existent or extremely limited. Public order charges of a more serious nature fall under the jurisdiction of the Department of State Security. In these cases the detainee can be held for several weeks or months, with little or no access to a defence lawyer.

41. The United Kingdom provides another example in which special practices depart from a country's own legal norm. For example, although the accused has a right to counsel, section 58 PACE Act of 1984 states that the accused must be informed of this right once they are in police detention. A non-governmental organization reported in 1991, however, that the PACE provision does not apply to detention of an accused person outside the police station; hence, the organization documented several cases where the accused was questioned outside the police station without counsel, and the answers given were later used against the accused. Moreover, although section 58 of PACE provides for the right to counsel upon arrival at the police station, a non-governmental organization reported in 1988 numerous instances of accused persons held in incommunicado detention, even though their counsel had attempted to contact them. During these periods of detention, many of the accused confessed under oppressive questioning techniques and/or ill-treatment at the hands of the authorities.

42. In Bangladesh, the Special Powers Act of 1974 (SPA) contradicts article 33 (1) of the Constitution which states that no citizen can be denied the right to consult and be defended by a legal practitioner of his or her choice. Under the SPA, the Government of Bangladesh may detain a person without charge for an initial period of 30 days to prevent the commission of "any prejudicial act". Although a person detained under the SPA is theoretically entitled to see a lawyer at the time of detention, in practice, a lawyer is generally not allowed to see the detainee until a specific charge has been filed. The Government is not required to formally charge the detainee until the end of the 30-day detention period.

43. In the Republic of Korea, the Constitution and laws guarantee the defendant's right of access to legal counsel. The laws also require that the accused be informed of this right to counsel. A Korean non-governmental organization reported in 1991, however, that political prisoners who are classified as "public security cases" are usually restricted in this right to counsel. The non-governmental organization reported that denial of counsel is especially common in interrogations by the Agency for National Security Planning, the Military Security Command, or the Security Division of the National Police Headquarters.

44. In Bahrain, article 79 of the Code of Criminal Procedure stipulates that persons arrested or detained have the right to consult a lawyer within 48 hours of arrest. In practice, however, a non-governmental organization reported in 1990 that some detainees are unable to speak to counsel before confessing to charges. Another non-governmental organization reported in 1990 that persons detained without trial, pursuant to either article 79 of the Code of Criminal Procedure or the Decree Law on State Security Measures, are held for long periods of incommunicado detention and generally do not see their court-appointed lawyer until shortly before their trial begins.

45. In Indonesia, the Criminal Code stipulates that every criminal suspect has the right to legal representation and requires the police to notify suspects of this right. Article 69 of the Indonesian Criminal Code stipulates that defence counsel has the right "to contact a suspect [from] the moment of arrest or detention at all levels of examination". A non-governmental organization reported in 1993, however, that defence counsel is frequently denied access to detainees suspected of serious or political crimes.

46. A non-governmental organization reported in 1991 that the lawyers for two persons charged with treason and espionage in the Syrian Arab Republic were not allowed to speak during an in camera trial.

47. Lawyers in the occupied territories have encountered procedures which frustrate their ability to represent Palestinian detainees. In some detention centres, such as the Dhahiriya detention centre in the West Bank, visits must be booked by telephone weeks in advance and the centre's telephone is usually busy. Moreover, visiting hours are extremely limited and detainees are frequently transferred, causing difficulties in locating and therefore visiting them. Visits to detainees held in "holding facilities" awaiting transfer to longer-term detention facilities are not permitted by the Israeli authorities.

48. Several countries provide appointed counsel for the indigent accused. The Czech Republic's Constitutional Act (Bill of Rights), article 37 (2), provides that every person has the right to legal assistance from the very start of court proceedings and the court appoints a lawyer if the accused fails to obtain defence counsel.

49. Several countries only appoint counsel for persons charged with serious offences. In Canada, for example, legal-aid attorneys are provided for those charges which carry the risk of incarceration, or those which are contrary to an act of Parliament and subject to indictment. In Germany, counsel is appointed in all cases before the district court; in cases before the county court, counsel is appointed only in the following circumstances; if felony charges are involved; if a professional licence may be suspended; if the defendant has spent three or more months in custody; if psychiatric examination or treatment may be necessary; if the previous defence counsel has been discharged by the court because he or she is suspected of involvement in the offence charged; if extraordinary complex factual or legal situations are involved; and if the defendant is incapable of conducting his or her own defence. In South Africa, despite the creation of a governmental legal-aid office in 1969, indigents accused of a crime are not entitled to counsel.

In 1987, a non-governmental organization reported that 80 per cent of all criminal defendants were unrepresented by counsel during trial. The South African Criminal Procedure Code permits, however, automatic appellate review of cases involving sentences greater than three to six months' imprisonment when the accused was unrepresented by counsel at trial.

50. The remuneration of appointed counsel varies by country, but it is usually substantially less than fees charged by retained counsel. The Government of Finland reports that legal-aid attorneys normally receive 20 per cent less than they would otherwise receive from paying clients. Australia also pays legal-aid counsel 80 per cent of their normal billing rate. Similarly, in the Netherlands, a non-governmental organization reported that legal-aid attorneys are paid on a scale depending on the seriousness of the case and the time spent on the defence. Further, the fees appointed counsel receive for representing indigent accused in Kuwait are substantially lower than fees charged by private criminal defence lawyers. A non-governmental organization reported that in 1991, appointed counsel received, on average, 10 Kuwaiti dinars per case whereas private practitioners received as much as 10,000 Kuwaiti dinars per case.

51. There are situations where the level of competence of appointed counsel falls far below the quality of retained counsel. In the United States, for example, the Fourteenth Amendment to the Constitution requires that criminal defendants enjoy due process of law. The Sixth Amendment to the Constitution has been interpreted to guarantee the right to effective assistance of counsel. In 1989, a non-governmental organization reported that in several capital cases, the accused received incompetent counsel at the trial and sentencing stages. In one case, the non-governmental organization reported that an accused was executed even though defence counsel spent only eight hours preparing his defence. In another example, during the sentencing hearing, the defence counsel failed to call any mitigating witnesses and failed to mention that the accused was suffering from a mental deficiency at the time of the murder.

IV. HEARING

52. Several countries have established specific time limitations to prevent accused persons from being tried after undue delay. For example, in January 1992, Bangladesh amended the Code of Criminal Procedure to place strict time limitations on the duration of criminal proceedings. The new Code requires magistrates to conclude trials within 120 days from the date they first receive the case and gives mid-level judges no more than 240 days to try a case. The Netherlands, following a European Court of Human Rights ruling that initial proceedings before a court should be completed within two years of arrest, either completes criminal proceedings within two years or dismisses the criminal complaint. In Finland, section 21 of the Coercive Measures Act provides that the hearing shall take place not later than four weeks after the initial detention decision when the accused is not in detention, and the hearing must take place within two weeks from the date of detention if the accused is held on remand. In Botswana, the High Court Rules permit judges to dismiss criminal charges when the trial has not commenced within one year of detention.

53. Other countries safeguard the right to be tried without undue delay through vague constitutional standards. In Hussainara Khatoon v. State of Bihar, the Supreme Court of India held that the Indian Constitution implicitly confers the right to a speedy trial. Article 37.1 of the Japanese Constitution explicitly recognizes the right to be tried without undue delay: "[i]n all criminal cases the accused shall enjoy the right to a speedy and public trial by an impartial tribunal." In interpreting the word "speedy", the Japanese Supreme Court has stated, "[t]he question of whether or not a delay, in an actual criminal trial constitutes a violation of this provision should not be based solely on the term of the delay, but whether the delay can be considered unavoidable or not and to what extent the interests that this provision aims to protect have suffered."

54. In Japan, constitutional provisions are supplemented by laws which impose specific time standards. Articles 208 and 209 of the Code of Criminal and Civil Procedure, for example, require that the decision to indict or release a detained person must be made within 23 days after arrest (13 days plus a 10-day extension for exceptional cases and a 5-day extension for cases of special crimes such as rioting). A Japanese non-governmental organization reported in 1992, however, that courts approve a prosecutor's requests for extensions of pre-trial confinement as a matter of course. Furthermore, there is no law which provides a time-limit for handling cases in which there is no confinement. A non-governmental organization reported in 1992 that, according to official statistics, delays in providing criminal trials in Cambodia are common. The Prosecutor General stated that 100 of the 265 criminal suspects were held, during 1991, in excess of the period provided by law.

55. The practice of administrative detention in several countries often conflicts with the right to be tried without undue delay. In Bahrain, for example, persons detained pursuant to the Decree Law on State Security Measures can be detained without trial for renewable three-year periods. A non-governmental organization reported in 1991 that detainees have been held up to eight years without ever being tried in Bahrain. In Jordan, a non-governmental organization reported in 1990 that political opponents have been detained without trial for as long as 15 years.

56. Many countries have provisions which require that trials should normally be open to the public. In some countries trial judges have discretion to prohibit public attendance. For example, judges in Niger have discretion to prohibit public attendance at trials. The law of Niger states, "Unless otherwise provided by law, all hearings are held in public so long as they are not deemed dangerous to public order or morals." A non-governmental organization reported that a 1985 military trial in Niger, where 12 people were sentenced to death, was held in secret under summary procedures. In the Islamic Republic of Iran, article 165 of the Constitution stipulates that members of the public may freely attend criminal trials unless the court determines that an open trial would be contrary to public morality or order. The same principles apply to civil trials with the qualification that the public can be excluded from civil trials upon agreement by the parties.

57. A non-governmental organization reported in 1991, however, that almost every trial of a political prisoner in Iran has been held <u>in camera</u>. Similarly, in the Republic of Korea, despite a law mandating open trials, a

non-governmental organization reported in 1991 that anti-riot police have intimidated people from attending "public security" cases. The same non-governmental organization also reports that if anti-riot police are not used to intimidate attendees, hearings are often held in a place in which public access is restricted, such as a detention institution.

58. In both Iraq (art. 141 of the Code of Criminal Procedure) and India (sect. 177 of the Code of Criminal Procedure) criminal proceedings take place in the locality in which the offence was committed. Japan follows the same rule, but article 19 of the Code of Criminal Procedure allows the court to transfer a case upon request of the accused or prosecutor. A Japanese non-governmental organization reported, however, that a man was tried in a Tokyo court although the crime was allegedly perpetrated in Hokkaido and the accused lived in Hokkaido.

59. In Uruguay, article 21 of the Constitution prohibits criminal trial by default and therefore constitutes a prohibition of trials in absentia. In Cambodia, articles 38 and 39 of the 1989 Criminal Procedure Law permit trial in absentia. Article 39 further stipulates that the trial should proceed in the same way as trials where the accused is present. A non-governmental organization reported in 1992 that trials in absentia are quite common in some areas. In the Republic of Korea, the Special Measure Law Concerning Punishment of Anti-government Activists (Law No. 3045 of 31 December 1977) allows for the prosecution in absentia of persons accused of anti-government activity and who have fled the country. Following the establishment of guilt, the person can be sentenced and the accused's assets seized. The accused, moreover, is precluded from appealing.

60. Articles 230-232 of the Iraqi Code of Criminal Procedure stipulate that accused persons who are incapable of both understanding the proceedings against them and defending themselves are ineligible for trial.

61. Governments generally provide interpreters when the accused does not understand the language used in court. In Uruguay, for example, interpreters are provided during an examination of a witness who does not speak Spanish. In Japan, the Code of Criminal Procedure, article 175, requires an interpreter only when persons who do not understand the Japanese language are required to make a statement. The Third Petty Bench of the Supreme Court has held, however, that interpreters must be used to ensure that the accused understands the words of the court. It should be noted that article 181.1 of the Code stipulates that upon determination of guilt, convicts bear the costs of trial and this provision has been interpreted to include interpretation fees. In their reply to the questionnaire, however, the Japanese Government stated that an accused can obtain a waiver of costs because of indigency.

62. Article 48 of Zaire's Penal Code states, "Every person who is taken into custody by an officer of the Public Ministry, or by a judge, may request the assistance of an interpreter, translator, expert, or medical doctor." Article 51 of the Code of Criminal Procedure states that the Government should pay the costs of interpreters, experts, or doctors. According to a non-governmental organization, however, one court in Zaire conducted a trial in 1992 of 30 soldiers in French, even though many of the defendants did not understand that language and an interpreter was not provided.

63. In Uruguay, article 217 of the Code of Criminal Procedure stipulates that the examining magistrate is obliged to question any person with information which will contribute to discovering the truth of the matter disputed. The accused's spouse, relatives, natural brothers and sisters or guardians or wards, however, are not permitted to testify.

64. Numerous States require the prosecution to establish guilt beyond a reasonable doubt or by an intimate conviction of the decision maker. Many States also follow the principle that an accused person is innocent until proven guilty. For example, the preamble to the Moroccan Code of Criminal Procedure states: "Only a penal procedure which presumes the innocence of a suspect, fixes unbreachable limits to arrest and detention, guarantees the inviolability of the home, respects the right of property, which, in one word, protects citizens from errors or abuses committed in the name of society, is worthy of a free country." In the former Soviet Union, the Plenum of the Supreme Court held in 1979 that Soviet courts must adhere to the presumption of innocence. A non-governmental organization reported, however, that this principle was not applied in Soviet criminal trials because the executive branch objected to the decision. Other States enshrine the presumption of innocence in their constitution. Article 12 of the Tunisian Constitution, for example, states that "every accused person is presumed innocent until his guilt is established in accordance with a procedure offering him guarantees indispensable for his defence."

65. In Japan, a non-governmental organization has reported that guilt and sentence are determined simultaneously. The prosecution presents a detailed account of the accused's background including the previous record of the accused, previous arrests, and contacts with criminal organizations.

66. In the United States, evidence which has been seized illegally must generally be excluded from a criminal trial. In Japan, the Supreme Court in 1978 held that evidence illegally obtained is admissible under most circumstances. The evidence the Court stated, should only be excluded if it is determined that the spirit of conducting investigations as specified by the Constitution and the Code of Criminal Procedure has been destroyed and that the admission of evidence would encourage future illegal investigations.

V. COMPOSITION OF THE COURT

67. The personal independence of judges is guaranteed in the constitutions and laws of numerous countries, as evidenced in the following examples describing the processes for the removal of judges. In the Islamic Republic of Iran, article 164 of the Constitution stipulates that judges cannot be removed except by trial and establishment of guilt. In Zambia, article 98 of the Constitution stipulates that judges can be removed only on grounds of proved misbehaviour or incapacity. To remove a judge on these grounds, the Constitution directs the Zambian President to appoint a tribunal consisting of at least two members who hold or who have held high judicial office. The President can then remove the judge only upon recommendation of the tribunal. Not all judges in Zambia share the same security of tenure, however. High Court Commissioners have identical jurisdiction and powers as High Court Judges, but the President can revoke the appointment of a High Court Commissioner on the advice of the Judicial Service Commission.

68. The independence and impartiality of judges are protected in a variety of ways, as the following examples illustrate. The constitutions of several countries provide for fixed terms or lifetime tenure. In Zambia, for example, judges of the Supreme and High Court can serve until they are 65 years of age. In Iran, judges cannot be transferred without their consent unless transfer is in the "interests of society" and the Supreme Judicial Council unanimously assents to the transfer. In India, articles 121 and 211 confer judges' immunity from lawsuits.

69. In times of public emergency or national security crises, judicial independence is frequently jeopardized. Following the August 1991 coup d'état in Haiti, for example, the Commission on Human Rights Special Rapporteur on Haiti observed that forces which wield actual power - the armed forces, police, the section chiefs and the "Tontons Macoutes" - have rendered the judiciary powerless. The Special Rapporteur also concluded that the pervasive interference of the executive in judicial affairs has rendered the administration of justice in Haiti a sham. A non-governmental organization reported that during 1989, several judges in the Sudan were dismissed by the Revolutionary Command Council in retaliation for submitting a memorandum to the Council protesting the previous dismissal of some of their colleagues. A non-governmental organization reported in 1992 that the independence of civilian court judges has been seriously undermined by the State Law and Order Restoration Council in Myanmar, which is an organ of the military Government. One Divisional justice, for example, was arrested and subsequently convicted by a military tribunal for releasing 50 detained villagers.

70. There is a considerable diversity among nations in regard to the use of juries or lay assessors when adjudicating criminal and civil cases. South Africa abolished the jury system in 1969 on grounds that it is too time-consuming and expensive. Following the abolition of the jury system, however, South Africa increased the use of lay assessors in criminal trials. The presence of assessors is mandatory in cases where the judge considers the death penalty as a likely sentence; in less severe cases the appointment of assessors is at the discretion of the judge. In contrast, several countries make extensive use of the jury system. In the United States, for example, the Sixth Amendment to the Constitution provides that the accused has the right to a jury trial. Civil litigants in the federal courts of the United States also enjoy the right to a jury trial in many cases. In Canada, section 11 of the Canadian Charter of Rights and Freedoms guarantees the right to a jury trial where the penalty may involve imprisonment of five years or more. In Mexico, article 20 of the Constitution provides for the appointment of juries for certain crimes.

71. Countries impose different qualifications for selecting jurors and lay assessors. In Belgium, for example, jurors must be literate voters between the ages of 30 and 60. In Mexico, jurors must be literate citizens who live in the vicinity where the crime was committed. Persons not eligible for jury duty in Mexico include civil servants, religious ministers, convicts, probationers, and individuals who are blind or deaf.

VI. DECISION, SENTENCING AND PUNISHMENT

72. Numerous countries require a court to substantiate their decisions relating to convictions and sentencing. The Cuban Government responded to the Special Rapporteur's questionnaire by indicating that in all cases the tribunal must state the reasons for its decision and the evidence that was presented by the parties but was not considered. The Austrian Government responded that every judicial decision must be in writing and contain a detailed statement of the reasons explaining the decision. In Sweden, section 30:5 of the Code of Judicial Procedure states that judgements of the court shall be in writing and must specify the reasoning in support of the judgement, including a statement of what has been proved in the action. The judgement may be in simplified form, however, if the accused has confessed and the sanction is for no longer than six months' imprisonment. In Italy, article 544 of the Italian Code of Criminal Procedure states that following trial, the court must explain its decision in an opinion that reviews the evidence and explains in detail the grounds for the decision. If the court cannot formulate its opinion immediately, it must do so within 30 to 90 days. In Germany, the Code of Criminal Procedure requires the court to make an exhaustive written judgement which describes in detail the evidence and findings of fact. In Cambodia, the Supreme National Council, with the assistance of UNTAC, adopted a provision stating that all criminal judgements "must indicate the acts held against the accused and the witnesses or evidence on which the judge relies, as well as the explicit grounds of the conviction." In Iraq, article 224 of the Code of Criminal Procedure requires criminal courts to substantiate their decisions with applicable law. Article 159 of the Iraqi Code of Civil Procedure requires civil courts to substantiate their decisions with applicable law.

73. Article 82 of the Japanese Constitution and article 35.2 of the Japanese Code of Criminal Procedure provide that judgements must be declared in a public court, and that the formal adjudication and rationale must be read aloud.

74. Numerous countries prohibit trying an individual for the same offence twice. For example, in Senegal, article 342 of the Code of Penal Procedure provides, "No person who is legally acquitted may be accused of the same facts, even if under a different law."

75. Numerous countries prohibit the use of ex post facto laws to charge and convict individuals of a criminal offence. For example, article 20 (1) of the Constitution of India states, "No person shall be convicted of any offence except for violation of law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence."

76. Many countries buttress the right not to be tried under ex post facto laws with provisions which limit the application of amended penal laws. In Cuba, for example, article 3 of the Penal Code states that the courts may only apply the law enforced at the time the crime is committed, unless the new law

is more favourable to the accused. Similarly, article 2 of the Iraqi Penal Code stipulates that amendments to criminal laws operate retroactively only if favourable to the accused.

77. In Sudan, article 3 of the 1983 Judicial Sources Act introduced the principle of "free interpretation". According to a 1990 non-governmental organization report, "free interpretation" permits a judge in a shariah court to convict a criminal defendant by searching the Koran to find an applicable offence in the event a defendant is not guilty of a codified penal law. The same report indicated that several people had been subjected to this practice, including one defendant who was hanged in January 1985 for the offence of apostasy, even though apostasy was not an offence listed in the penal laws.

78. Pursuant to the Iraqi Enforcement Act No. 45 of 1980, debtors are subject to imprisonment for short periods in order to force repayment of debt.

79. There are a number of countries which maintain the death penalty, but the existence of the death penalty renders far more serious any defects in the fairness of trial procedures. In Jamaica, a prisoner may appeal to the Privy Council in England. In 1989 a non-governmental organization reported that the Privy Council quashed the convictions of 10 prisoners under sentence of death in Jamaica. The Privy Council overturned the convictions because the trial judge failed to instruct the jury adequately on the issue of identification evidence. The offences which carry the death penalty vary between countries. In the Islamic Republic of Iran, the Penal Code stipulates that the death penalty applies to the following offences: murder, drug offences, insurrection, adultery, prostitution and other moral and religious offences. The following offences carry a mandatory death sentence: adultery, sodomy, malicious accusation, drug trafficking, possession of more than 5 kilograms of hashish or opium, and possession of more than 30 grams of heroin, morphine, codeine or methadone. The Special Representative of the Commission on Human Rights reported that 884 executions took place in Iran between 1 January and 7 December 1991. In Bangladesh, the Penal Code prescribes capital punishment for the following offences: waging war or attempting to wage war, abetting a mutiny, murder, murder while committing a robbery, giving false and fabricated evidence with intent, culpable homicide amounting to murder, and treason. Recent amendments to the Constitution have increased the number of offences that are punishable by death. For example, the Cruelty to Women Act (passed 8 July 1988) prescribes the death penalty for attempting to kill or physically assault a woman, for causing death to a woman while committing rape or after committing rape and for trafficking in women. The Dangerous Drugs (Amendment) Act (1988) prescribes capital punishment for manufacturing, cultivating, importing, exporting, and trafficking in dangerous drugs.

80. Despite laws permitting the imposition of the death penalty several countries have not executed a convicted criminal for many years. For example, although premeditated murder, acts of barbarism, hostage-taking, espionage and treason are offences which carry the death penalty in Senegal, a non-governmental organization has reported that the last execution took place in 1967.

81. A non-governmental organization reported in 1991 that condemned prisoners in South Africa normally receive notice of their execution within seven days before they are scheduled to hang.

82. The special procedures for seeking pardon or clemency from a death sentence vary around the world. In South Africa, for example, the State President is empowered to extend mercy and commute a sentence of death to another sentence, or request the trial court to examine new evidence which might affect the conviction or sentence. A non-governmental organization reported that only 12 per cent of those sentenced to death were granted reprieves in 1987. In the Bahamas the Governor General is empowered to grant clemency in death penalty cases. A special committee first considers the prisoner's trial records, any clemency petition submitted, as well as reports from a doctor, the police, and a probation officer. The committee will then advise a cabinet minister. After studying the committee's advice, the minister advises the Governor General on whether to grant or deny clemency. In Iran, persons convicted of murder can be pardoned by the victim's male next of kin. The next of kin has discretion to accept payment or authorize the use of the death penalty.

83. Even countries which still maintain the death penalty do not ordinarily execute juveniles, mentally incapacitated persons and pregnant women. In the United States, however, a few juvenile offences and incapacitated persons have been executed. In 1991, for example, a non-governmental organization reported that the United States executed a number of juveniles (persons under the age of 18 at the time of the offence). The non-governmental organization also noted that a number of those juveniles who were executed also suffered from mental retardation.

84. The Special Representative of the Commission on Human Rights investigating the situation of human rights in the Islamic Republic of Iran reported that most executions in 1991 were carried out by public hanging. Iran uses other methods of execution, however. Article 119 of the Islamic Penal Code stipulates that persons convicted of adultery and prostitution are subject to execution by stoning. The United Nations Special Representative of the Commission on Human Rights noted that three people were reportedly stoned to death in 1991. Article 207 of the Islamic Penal Code stipulates that persons adjudicated a mohareb (at enmity with God) or mofsed fil arz (corrupt on Earth) can be put to death by crucifixion.

85. In the 1992 report on the Islamic Republic of Iran (E/CN.4/1992/34) the Special Representative of the Commission on Human Rights noted that the imposition of judicial punishments which constitute torture or cruel, inhuman or degrading treatment reportedly remains widespread. The Special Representative reported that on numerous occasions during 1991, hands and fingers were amputated for theft offences. The Law of Ta'azirat (a section of the Islamic Penal Code) contains more than 50 offences subject to lashings of 74 strokes. The Special Representative reported in 1992 that two men were subjected to 74 lashes prior to being executed on drug trafficking charges. The Special Representative also noted that he received reports indicating that several signatories to an open letter to the Prime Minister were convicted and sentenced to imprisonment with 20 to 30 lashes. In 1989 a non-governmental organization reported that hundreds of people were sentenced to repeated

flogging for various offences. A spokesperson for the Supreme Judicial Council of Iran stated that 4,467 corporal punishments, mainly repeated flogging but including amputations, were administered from March 1986 to March 1987.

86. Zimbabwe, like Iran, also permits whipping as a punishment for adult males. Section 329 of the Criminal Procedure and Evidence Act permits a maximum of 24 strokes. According to a 1985 magistrates conference report, however, strokes are seldom imposed. Additionally, strokes are, in practice, imposed only for offences involving violence of a brutal or cruel nature, and then not more than eight strokes are ordered.

87. In contrast, article 8 of the Namibian Constitution provides that no person shall be subject to torture or to cruel, inhuman, or degrading treatment or punishment. In the case of In Re Corporeal Punishment by Organs of States, the Supreme Court held that corporal punishment of juveniles or adults is unconstitutional because it constitutes degrading and inhuman punishment within the meaning of article 8.

VII. APPEAL OR OTHER REVIEW IN HIGHER COURTS

88. Several countries have provisions which direct the higher courts to review, as a matter of course, convictions carrying heavy penalties. In the Philippines, for example, article VIII of the Constitution provides for automatic appellate review of any sentence imposing life imprisonment. In Uruguay, sentences imposing more than three years' imprisonment are automatically reviewed on appeal. In Zambia, severe sentences imposed by the Subordinate Court require confirmation by the High Court. In Zimbabwe, sentences of the Magistrate Courts which impose more than six months' imprisonment or a fine of over $200 must be submitted for review by a judge of the High Court. In 1984, a non-governmental organization reported that the Zimbabwean High Court modified the decisions of magistrates in over 400 cases.

89. In several countries the right to appeal is restricted to serious offences and heavy penalties. In France, for example, appeals from the Police Court are permitted only in cases where the penalty exceeds five days' imprisonment or 1,300 francs.

90. The right to appeal criminal convictions and sentences is sometimes abridged during times of national emergency or governmental instability. For example, a non-governmental organization reported in 1993 that the Government in Chad had established a court martial empowered to impose death sentences as a final judgement.

91. In Cambodia, the 1989 Constitution does not confer the right to appeal a conviction passed by the provincial and municipal People's Courts. Articles 64 and 73 of the Criminal Procedure Law, however, allow the defendant or the victim who disagrees with the verdict to bring a complaint to the Supreme People's Court. The Supreme People's Court also reviews cases on its own initiative. The Court only considers questions of law and not fact. During the first half of 1991, the Court reviewed 83 criminal court judgements and found that only 6 had shortcomings necessitating further review of the whole case file.

92. The right to appeal is sometimes eliminated or restricted for persons convicted of offences of a political or national security nature. In Tunisia, for example, governmental officials convicted of treason by the High Court cannot appeal. In the Islamic Republic of Iran, convictions imposed by Islamic Revolutionary Courts are considered final and not subject to revision on appeal. In Zaire, convictions imposed by the State Security Court are appealable only on points of law.

93. Several countries require convicted persons to file a notice of appeal or to appeal within a short period following sentencing. In the Philippines, for example, an appeal must be filed within 15 days from the date the judgement was pronounced; otherwise, the judgement will be final. In Uruguay, convicted persons must appeal their sentence within three days. In Sweden, section 50:1 of the Code of Judicial Procedure gives a convicted person three weeks in which to appeal.

94. Appellate courts in several countries have broad powers to review a lower court's decision on errors of law and fact. The Philippines, for example, allows a convicted person to appeal the lower court's factual and legal conclusions. In Italy, article 597 of the Code of Criminal Procedure similarly permits an appellate court to partially or completely reform any aspect of the trial court's decision.

95. In Cambodia, the Supreme Judicial Council, with the assistance of UNTAC, adopted a provision which stipulates that any convicted person may request appellate review "to determine whether they have been convicted for their ideas, opinions, statements, or their membership or non-membership in a racial, ethnic, religious, political or social group".

96. Some countries restrict the ability to appeal from civil judgements. In Mexico, for example, article 230 of the Code of Civil Procedure limits the right of appeal to cases involving more than 1,000 pesos or cases which cannot be valued by money.

97. The ability to appeal from interlocutory judgements is not recognized in some countries, or in others, is difficult to obtain. In Cuba, intermediate judgements in both criminal and civil cases are not appealable. In the Philippines, appeals from interlocutory judgements are possible through a petition of certiorari; however, certiorari is rarely granted in practice.

VIII. PARDON

98. Several countries provide extrajudicial procedures for pardoning persons convicted of a crime. The power to pardon individuals generally resides in the office of the President or head of State, as in Austria, India and the Philippines, for example. In some countries, the power to pardon is shared by other high governmental officials, such as governors of states, as in the United States and Mexico. In Uruguay, competence to grant pardons rests in the General Assembly. In Iran, the Leadership Council, composed of five or more maraji-i taqlid (scholars of Islamic jurisprudence) recognized as having outstanding leadership capacity, has authority to pardon or reduce the sentence of any convicted person upon recommendation from the Supreme Court. Moreover, the Special Representative of the Commission on Human Rights

interviewed several high-ranking members of the Iranian judiciary who indicated that a supplemental, extraconstitutional procedure was used to pardon individuals. The Special Representative reported that there was a commission for pardons which acted on applications. After the commission approves an application for pardon it is forwarded to the Head of the Judiciary and finally to the Leader of the Islamic Republic for a final decision.

IX. OTHER REMEDIES

99. Section I of the present document discusses the remedies available to persons who have been detained illegally or who have been subjected to ill-treatment preceding trial. The principal remedies include mechanisms such as habeas corpus, amparo and penal laws holding officials accountable for the ill-treatment of detainees. This section briefly outlines other remedies available to persons subject to human rights violations.

100. The legal system of the Philippines illustrates the breadth of alternative mechanisms for redressing violations of rights. First, individuals can file a complaint with the Philippine Commission on Human Rights which has the power to investigate complaints of violations of article XIII of the Constitution. The Commission, however, does not possess prosecutorial powers and therefore cannot enforce its decisions. A regional non-governmental organization reported that in 1989, of the 2,315 complaints the Commission received, only 327 (14.1 per cent) were resolved by the Commission. Second, Administrative Order No. 101 created the Presidential Human Rights Committee, but like the Human Rights Commission, it is purely an advisory body. Article III of the Philippine Constitution of 1987 allows victims of torture, or their families, to seek compensation, but as of 1992 the law on compensation had not been passed. Third, the national police are subject to civil liability pursuant to article 32 of the New Civil Code and Republic Act. Persons seeking damages under this Act are required, however, to pay filing fees proportionate to the amount of damages sought. A non-governmental organization reported in 1991 that many victims of abuse cannot afford these filing fees. The victims can, however, ask the court to allow them to litigate in forma pauperis, but the court has sole discretion in deciding whether to grant the request. A regional non-governmental organization also reported in 1992 that families of victims often have difficulty executing the judgements, and consequently rarely recover damages. Fourth, as noted by the Philippine Government in their reply to the Special Rapporteurs' questionnaire, victims of abuse or their families may file administrative complaints before agencies such as the Office of the Inspector General. A regional non-governmental organization reported, however, that soldiers exercise a great deal of control over these proceedings and witnesses are often afraid to testify.

101. The United Nations Commission on Human Rights Expert on Equatorial Guinea reported in 1992 that the President of Equatorial Guinea created the Committee on Human Rights which has competence "to receive complaints and in such cases take steps to investigate possible violations within the country and make

appropriate recommendations to the president of the Republic or to citizens" (E/CN.4/1992/51). The Expert noted that the Committee had met only once since its establishment and during that meeting considered complaints and petitions by 15 citizens, all of which were still under review.

102. In some countries habeas corpus is restricted in times of national emergency or when petitions are sought by political dissidents. The experience in Jordan exemplifies restrictions on habeas corpus as well as how Jordanian courts have responded to these national security laws. In recent times, three laws have severely restricted the ability of regular courts to review the legality of administrative detention. The Martial Law Directives of 1967 suspend habeas corpus as well as remove the jurisdiction of the High Court of Justice over detention matters. The Defence Law confers broad powers of detention upon local administrative governors without providing for administrative or judicial review of detention. In addition to emergency provisions, the Law on Prevention of Offences similarly confers broad powers of detention upon local administrative governors without providing judicial review. The Jordanian High Court of Justice declared article 20 of the Martial Law Directives unconstitutional in so far as it prevented the court from reviewing decisions not related to public safety. On these grounds, the High Court of Justice has occasionally reversed administrative decisions. Overall, however, a non-governmental organization reported that the High Court of Justice has been reluctant to challenge detention decisions made by the executive branch. For example, in a 1979 case, the High Court affirmed the principle that courts should defer to administrative decisions. Further, with respect to detention pursuant to the Defence Act, the Jordanian High Court of Justice has on occasion affirmed its power of ensuring that the expression "public security" was not given an unduly wide interpretation. Notwithstanding a few cases where detentions have been invalidated, a non-governmental organization concluded that the executive discretion in detaining individuals has not been curbed.

103. The experience of Guatemala similarly illustrates the ineffectiveness of habeas corpus during times of national emergency or insurgency. The United Nations Commission on Human Rights Expert on Guatemala reported in 1991 that habeas corpus has been ineffective in alleviating the practice of disappearances (E/CN.4/1991/5). The Expert cited a non-governmental report which documented that the Guatemalan Supreme Court of Justice received 5,729 habeas corpus applications. The non-governmental report indicated that 4,128 applications went unanswered. The non-governmental report further stated that the police produced only 215 people who were subjects of the habeas corpus applications, and that courts determined that only 28 persons had been legally detained.

104. The military Government suspended the 1989 Constitution in Chad after coming to power in December 1990. A non-governmental organization reported in 1993 that detained individuals have subsequently been unable to challenge their arrest and detention in a civilian court.

105. Several countries provide recourse for persons wrongly convicted or detained. In Nepal, for instance, article 14 of the 1990 Constitution stipulates that full compensation and rehabilitation is provided for miscarriages of justice. In the Philippines, a person who has been wrongfully

convicted may seek damages in an action for malicious prosecution. In Indonesia, a person can challenge an illegal arrest or detention in a pre-trial hearing, known as a pra-peradilan. The court may, at the conclusion of a pra-peradilan, order the release of a detained individual as well as award compensation. A non-governmental organization reported in 1993 that the rate of success in pra-peradilan hearings is small: only 5-10 per cent of all criminal cases resulted in an outcome favourable to individuals.

X. PROCEDURES FOR JUVENILES

106. The Special Rapporteurs did not receive a significant body of materials on the procedures and national practices related to the treatment of accused juveniles. The necessity for special procedures and protection for juveniles is already reflected in international standards. In 1985 the General Assembly unanimously adopted the United Nations Standard Minimum Rules for the Administration of Juvenile Justice. For a discussion of the application of international standards relating to juveniles in various national criminal justice systems, see the report prepared by Mrs. Mary C. Bautista which was presented at the forty-fourth session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (E/CN/Sub.2/1992/20 and Add.1).

107. The following examples are provided to illustrate the existence of special procedures for accused juveniles in several countries. In Canada, for example, the Young Offenders Act contains many provisions for accused juveniles not available for adults. Some of these provisions include, for example, prohibitions on disclosing court records as well as providing an opportunity for the accused juvenile to consult with counsel or a parent prior to giving a statement. In Zambia, section 123 of the Juveniles Act forbids the press from publishing the address of juveniles. The Zambian Juveniles Act also states that juveniles should be imprisoned only when it is determined that incarceration is the last resort. In the Philippines, the Child and Youth Welfare Code stipulates that juveniles must be segregated from adult prisoners. In Iraq, the Juvenile Welfare Act states that procedures in juvenile trials should be simple and more expeditious than adult trial procedures.